

**Legal Techniques**  
**for**  
**MEDICAL &**  
**PERSONAL PLANNING**  
**for**  
**ALZHEIMER'S FAMILIES**  
**IN NEW HAMPSHIRE**



**THE ALZHEIMER'S DISEASE PROGRAM**  
**NH BUREAU OF ELDERLY AND ADULT SERVICES**  
**1-800-351-1888, Extension 4680**  
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NEW HAMPSHIRE FAMILY CARE GUIDE FOR  
ALZHEIMER’S DISEASE AND RELATED DISORDERS  
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# INTRODUCTION

You can strengthen your family relationship and improve your peace of mind by learning how the disease process may affect the person with Alzheimer's or how it may affect other family members. With this information, you can then begin to prepare for these changes.

Sources of expert advice for you are:

1. Your attorney, who can consult the Senior Citizens Law Project.
2. Senior Citizens Law Project, targeted toward people of limited means (Tel: 1-888-353-9944)
3. New Hampshire Bar Association, especially its Elder Law Section attorneys, who can be contacted through its Lawyer Referral Service (Tel: 603- 229-0002).

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*Sometimes families either postpone legal planning or fail to request helpful community services. Reading this pamphlet and prompt planning with your lawyer or the New Hampshire Legal Assistance's Senior Citizens Law Project can relieve your fears, assure that you and the person with Alzheimer's disease can receive important services.*

Keeping in mind that Alzheimer's is a long-term disease, lasting 2 to 20 years, the broad goals of this planning should be:

1. To maximize the independence and personal autonomy of the person with Alzheimer's for as long as possible.
2. To assure full access for the person with Alzheimer's and for his/her family to the entire range of services and health care that may be needed.
3. To protect the spouse of the person with Alzheimer's from emotional devastation.

This guide explores the legal techniques available in New Hampshire for medical planning. The last section briefly describes some of the Medicaid program's financial eligibility rules. Medicaid is the only governmental program that pays for institutional long-term care (Medicare pays only for diagnosis, medical care and short term skilled nursing care). Establishing Medicaid eligibility for a person with Alzheimer's may become necessary when the disease reaches an advanced stage.

## **I. SUBSTITUTE DECISION-MAKING DEVICES**

### **A. Durable Power of Attorney for Financial Matters**

A power of attorney is a document under which a **principal** (the person with Alzheimer's) give an **agent** or **attorney-in-fact** (usually a spouse, friend or family member) the authority to make decisions and manage that principal's affairs. How much power and authority is given to the agent depends on the document (POA) signed by the principal. The (POA) can be very specific and can include a time limit; for example, only giving authority to sell a house at a fixed price by a certain date.

A POA can also be very broad, giving the agent the authority to manage all financial affairs.

A POA will be invalid if the principal becomes incompetent (unable to make decisions) unless the POA is "durable". A POA is a **Durable** Power of Attorney if the agreement contains the statement: "This shall not be affected by the subsequent disability or incompetence of the principal", or a statement of similar meaning. A Durable POA will remain in effect when the principal becomes incompetent.

In New Hampshire, a Durable POA must be signed in the presence of and acknowledged by a judge, court clerk, notary public, or justice of the peace. A Durable POA is, however, a private document. It is not necessary to file a POA with any court or agency.

Anyone interested in preparing a Durable POA for financial matters should

consult with a New Hampshire attorney.

It is important to understand that a competent principal can revoke a POA at any time by telling the agent and all those who have dealt with the agent that the POA has been revoked. Unless revoked or otherwise limited by its own words, the POA will remain in effect until the principle dies.

The POA is a simple, inexpensive, and informal way of delegating decision-making authority. The principal can choose her agent and then specify how she wants her affairs managed. There is no court action required. However, a Durable POA can be greatly abused in the hands of an unscrupulous agent, especially when the principal has become incompetent and cannot speak for herself. Before signing a POA, the principal should carefully discuss her wishes with her proposed agent and alternate, if any, and try to make certain that these agents are trustworthy and reliable. It is also possible to require that the agent prepare periodic accountings (reports of what the agent has done in managing the principal's affairs) and give these accountings to the principal and third parties (for example, other relatives or the principal's attorney).

If possible, the principal should choose an alternate agent who will take over if the first agent is later unable or unwilling to serve. In order to avoid confusion and hard feelings later on, the principal should tell all close family members of her decisions about who will be her agent and alternate agent.

If a relative, friend or other interested person believes that an agent has been neglecting her duties or has stolen or mismanaged funds she should bring a court action against the agent to require an accounting, invalidate actions taken by the agent, or terminate the POA entirely. The intervening person can obtain payment of her attorney's fees in some cases.

## **B. Joint Ownership**

Many elderly or disabled people add the name of a relative or friend to their bank accounts or other assets. Such joint ownership may enable either owner to use the entire asset, so that an untrustworthy co-owner might be able to strip the true owner of the entire value of her property. If property is held as "joint owners with right of survivorship", the new owner becomes sole owner

upon the death of the original owner. This is a convenient way to transfer property, but it may raise problems regarding eligibility for Medicaid or tax liability. Property should be managed in this way only after careful consideration and consultation with an attorney.

### **C. Representative Payee**

A “representative payee” is someone who receives and manages the government benefits of another person (the beneficiary). The beneficiary can voluntarily request that such a payee be appointed or the government agency may decide that a payee is needed even if the beneficiary objects. If the beneficiary does not believe she needs a representative payee or wishes to terminate or change payees, she can file an administrative appeal with the agency involved. The representative payee system is subject to the same abuses as a power of attorney because there is little in-depth accounting required in most cases.

### **D. Conservatorship**

Filing a conservatorship petition with the Probate Court is a voluntary legal procedure for delegating financial management. When no longer able to handle financial matters due to physical or mental disability, an individual can ask the Probate Court to appoint a conservator to manage his financial affairs.

After appointment, the conservator will only have control of the property of the “ward”. The conservator cannot make medical or other decisions affecting the personal affairs of the ward, must file an accounting each year, and may be liable to the ward for losses caused by mismanagement. The ward may terminate the conservatorship at any time by petitioning the court. (See RSA 464-A).

With the growing use of Durable Powers of Attorney, conservatorships have become less common.

## E. Guardianship

In contrast to the power of attorney or conservatorship, guardianship is an involuntary legal process by which some of all of a person's decision-making power is given to another individual, after finding of the person's "incapacity" by the probate Court. "Incapacity" means a legal (not a medical) disability and is measured by the person's functional limitations, e.g. inability to provide for personal needs such as food, clothing, shelter, or health care. The decision-making power granted to the guardian may be over the person and/or her estate (property and financial affairs).

Because guardianship is involuntary, it is generally considered as a last resort. However, if no other planning has been done, guardianship is sometimes appropriate and necessary for incapacitated persons.

Guardianship proceedings must include notice to the proposed ward and a court hearing. Any relative, public official, interested person, or a person on his or her own behalf may file a guardianship petition with the Probate Court. The proposed ward has the right to representation by an attorney. If she cannot afford an attorney, the Court will appoint one.

Based on evidence presented at the hearing (which is closed to the public), a judge will decide whether the proposed ward has the ability to care for himself or herself. If the judge finds the individual incapacitated and also finds guardianship to be the least restrictive form of intervention necessary to protect the individual, she will appoint a guardian of the person and/or of the estate.

It is up to the judge to decide who will be named a guardian. In most cases, the court will choose a spouse, adult child, or other family member. New Hampshire law now allows a person to "nominate" (name) in advance the individual a person would choose as his guardian if a guardian were ever necessary. An individual can also list persons he would **not** want as guardian. The judge must appoint the person named so long as he is willing and qualified to serve as guardian. The judge may not, under any circumstances,

appoint someone a proposed ward has stated she or he does not want as guardian.

A person should consult an attorney if he is interested in nominating a guardian. The nomination must be in writing, signed, attested, and acknowledged in the same way a power of attorney is completed.

Depending on the scope of the judge's order, a **guardian of the person** may be empowered to determine where the ward lives (except that no guardian may place a ward in a state institution without prior approval of the Probate Court) and to consent to medical and other professional care. If the guardian is given power over the ward's **estate**, he will have control over the ward's property and financial affairs. Guardians must file detailed accountings or reports with the Court documenting their financial and personal management.

On the petition of any interested party, the Probate Court may appoint a temporary guardian for 60 days to do what is necessary to prevent immediate serious physical harm or mental harm to the ward or immediate serious physical harm to others.

Guardianship can be expensive, adversarial and time-consuming. A Durable Power of Attorney that is properly prepared and signed when the principal is competent can usually eliminate any need for a later guardianship proceeding.

## **II. HEALTH CARE PLANNING**

The rapid advance of medical science and technology has created difficult legal and ethical issues about health care decision-making.

It is possible for the physical health of a person with Alzheimer's to last for years after her mental abilities have gravely diminished. Such a person is incapable of making even routine decisions about medication and where and by whom care is provided, and incapable of decisions about prolonging life.

The legal system has created several techniques for dealing with these issues.

### **A. Durable Power of Attorney for Health Care**

In July 1991, a new Durable Power of Attorney for Health Care statute became law (R.S.A. 137-J). Durable Power of Attorney for Health Care (DPOAH) is an agreement between the principal and agent, which gives the agent authority to make medical decisions for the principal.

Because a DPOAH gives an agent the authority to make important decisions (which can include whether to discontinue life-sustaining treatment, and artificial food and hydration, the Legislature wanted to ensure that only fully-informed people would sign a DPOAH. Therefore, in order for a DPOAH to be valid, a special “disclosure statement” must be read and signed by the principal along with the DPOAH. The text of the DPOAH must be substantially the same as the sample text suggested by the Legislature. To prevent anyone from being forced to sign a DPOAH against her will, certain people (for example, a spouse or heir) are not allowed to sign as witnesses.

After a DPOAH is signed, it can be revoked just as a regular durable POA can be revoked. In any case, the agent will have no authority to make health care decisions until the principal’s physician certifies in writing that the principal is not capable of making health care decisions. **Even if the principal’s physician believes the principal is not able to make health care decisions, treatment cannot be given or withheld if the principal objects.**

A person can obtain the DPOAH forms and assistance in completing them from an attorney or from a social worker in a hospital or nursing home.

A DPOAH signed before July 1991 is still valid, but it is advisable to sign a new DPOAH that follows the new legislation.

### **B. “Living Wills”**

Many people have deeply held beliefs about the extent to which they wish to have their lives prolonged through technological means. Another planning

device permitted by New Hampshire state law (R.S.A. 137-H) is a “Living Will”. This is a written declaration by a competent person instructing his/her physician to provide, withhold, or withdraw life-sustaining procedures if the person is suffering from a terminal condition or permanently unconscious. The law allows a person the right to refuse artificial prolongation of life when death is close at hand, including a refusal of artificial food and hydration (for example, gastrostomy tubes, nasogastric tubes, intravenous feeding or hydration).

In order to execute a Living Will, a person must be of sound mind and 18 years of age or older. There are also specific provisions in the statute about who can witness the document. Living Will forms are available from lawyers and social workers in hospitals and nursing homes.

A Living Will is only effective when a person is suffering from a terminal condition or is permanently unconscious and thus its use is much more limited than a Durable Power of Attorney for Health Care. In addition, a Living Will can only tell your physician whether or not to give sustaining treatment if you are in a terminal condition. *A Living Will cannot give someone else the authority to make health care decisions for you*, if you are unable to speak for yourself.

If you have no Durable Power of Attorney for Health Care and are incapacitated, it may be necessary for your family to go to court for a guardianship (see Guardianship, page 5), a long and expensive process. Therefore, it is a good idea to have both a Durable Power of Attorney for Health Care and a Living Will.

### **C. Organ Donation**

Persons with Alzheimer’s disease should not make organ donations (except brain tissue for research) until scientific research has established without doubt the cause of the disease. For brain tissue donation, the patient does not need to use the organ donation process. The New Hampshire Legislature has authorized organ donation by adopting the Uniform Anatomical Gift Act, (R.S.A. 291-A). A competent adult may make a gift of any or all parts of her

body through a separate document or through her will. The donor may give the receiving facility notice, but this is not required. A person who has made such a donation may request that her driver's license so indicate.

In the absence of specific authorization, family members may make a donation. If the person who has died has not indicated any opposition to such an act.

### **III. MEDICAID**

#### **FINANCIAL ELIGIBILITY RULES IN NEW HAMPSHIRE**

Because many persons with Alzheimer's eventually require institutionalization in a nursing home or residential facility, their families may need to establish their Medicaid eligibility. Custodial nursing home care costs more than \$4,000 per month, an expenditure that far exceeds the monthly income of most persons with Alzheimer's. Because the Medicaid rules change frequently, we discuss these rules in an insert to the pamphlet. This is revised every six months in January and July. To obtain a printed copy of the "MEDICAID INCOME AND ASSET RULES FOR NURSING HOME RESIDENTS" pamphlet, contact the Bureau of Elderly and Adult Services at 1-800-351-1888 ext. 4680.

**Note:** An Advance Care Planning Guide which contains New Hampshire Advance Directives: Durable Power of Attorney for Health Care (DPOAH) and Living Will is available through the Foundation for Healthy Communities in English, Spanish, French, Braille and audiotape. The phone number for the Foundation for Healthy Communities is (603) 225-0900, or visit their website at [www.heathynh.com](http://www.heathynh.com).